followed by a "false imprisonment"—were not acting on any such orders or instructions when they did so, then the Appellant is not liable.

A careful study of the learned Magistrate's judgment as a whole has, however, inclined me to the view that he accepted the Appellant's denial of having either pointed at the Respondent as he was leaving the Court or given any orders for his arrest. The learned Magistrate finds, as a fact:

1. That the Respondent was arrested; and
2. That the Appellant caused his arrest through negligence.

In his judgment he states the Appellant's negligence to have been (a) his omission to find out why Mr. Powell Evans had not sued out a summons for the alleged offence of driving the lorry with inefficient brakes; (b) his failure to sue out a summons himself when he knew that a summons was the correct procedure; and (c) his entry of the inefficient brakes charge in the Police Charge Book though no summons had been issued and it was not an offence for which the Respondent could be arrested. It seems to me that the only proper inference to be drawn from these findings is that the learned Magistrate did not think the Appellant had intentionally brought about the Respondent's arrest and imprisonment.

Having drawn that inference, it seems to me that I must allow this appeal, because, on my view of the English Law of Torts, (1) the tort of false imprisonment cannot be committed negligently, and (2) all policemen and officers are fellow servants of the State and not responsible for one another's wrongful acts unless such acts are done by subordinates on the orders or instructions of their seniors. I am aware, of course, that Section 2 (ii) of the Public Authorities Protection Enactment lays it down that every action brought against an allegation that he "acted maliciously or negligently and without reasonable or probable cause," and I am also aware that both the learned counsel who argued this appeal did so on the assumption that if the Appellant did, in fact, act negligently, he is liable; but those words in that sub-section cannot, in my opinion, be read as creating a new tort of false imprisonment by negligence which can only be committed by public officers. The words which I have just quoted certainly raise some difficult problems of construction such as, for example, what is a reasonable or probable cause for negligence on the part of a public officer; but in the case of a claim for damages for false imprisonment, which is not a tort of negligence, I do not see how they can be read otherwise than as compelling the Plaintiff to plead that the act complained of was done maliciously and without reasonable or probable cause. It is therefore of interest to note that the learned Magistrate, in his judgment, has expressly negatived malice on the part of the Appellant though he found, quite properly, that there was no reasonable or probable cause for the Respondent's imprisonment.

For the reasons set out above I have decided to allow this appeal, and Section 2 (iii) of the Public Authorities Protection Enactment constrains me, somewhat reluctantly, to make an order that the Respondent do pay the Appellant his solicitor and client costs both here and in the Court below. My reluctance to make such an order as to costs is due to the fact that the Appellant undoubtedly brought these proceedings upon his own head by his careless disregard of the law relating to the issue of summonses for offences against our Motor Vehicles Legislation. To paraphrase and amplify a remark of the learned Magistrate, an attempt to save the time of the Court may be very well meant, but if it results in the wrongful imprisonment of a citizen, even for only a few minutes of time, more harm is done than good.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]

CUSSEN, J.

April 14, 1938.

RAMASAMY .....**Appellant.**

vs.

PUBLIC PROSECUTOR.....**Respondent.**

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 97 of 1937].

Criminal Law—enticing away a married woman—proof of marriage—sufficiency of—meaning of "taking"—Penal Code S. 498.

In a prosecution under section 498 of the Penal Code for enticing away a married woman marriage between the complainant and the woman alleged to have been enticed is sufficiently proved by evidence of the actual ceremonies performed at the "marriage" and by expert evidence to show that those ceremonies constituted a valid marriage.

A case under the section is established if it can be shown that the accused personally and actually assisted the wife to get away from the custody of the husband or of any person having the care of her on his behalf.

MAGISTRATE'S CRIMINAL APPEAL.

R. P. S. Rajasooria for Appellant.

M. C. Hay, Deputy Legal Adviser, for Respondent.

Cur. Ad. Vult.

CUSSEN, J.—This is an appeal against a conviction of an offence under section 498 Penal Code.

The argument of counsel for the Appellant proceeded on two grounds—

(1) that there was no sufficient proof of the marriage and

(2) that there was no evidence of advances and solicitations from the accused man to the married woman.

In support of the first contention the judgment of Whitley, J. in *Rex* vs. *Govindasamy* (Singapore Special Case No. 1 of 1932, II Malayan Law Journal 97) was cited. There it is laid down that "this being a criminal case the

marriage must be strictly proved." That is a proposition which is clearly correct.

What is necessary is that there should be evidence of the actual ceremonies performed at the "marriage" and expert evidence to show that those ceremonies constituted a valid marriage.

In the case cited the evidence produced to establish the marriage was:—

> "As to the ceremony eye-witnesses testified that all 'the usual Hindu Marriage rites were carried through by the priest of the Temple' but this Court has no judicial knowledge of what constitutes a valid Hindu marriage. The evidence on this point was considerably weaker than that adduced for the prosecution in the case of *R.* v. *Ratnam* (1930 S.S.L.R. 218)."

That case was an appeal from a conviction under section 498 Penal Code by a Police Magistrate in Singapore which was referred for hearing to a Court of three Judges (Murison, C.J., Thorne, J., and Stevens, J.).

The appeal was allowed on the ground that a valid marriage had not been proved.

In the joint judgment of Murison, C.J. and Stevens, J. the following relevant passage occurs:—

> "As to the ceremony (of marriage) there was evidence by a Brahmin priest as to the ceremonies required to constitute a Hindu Marriage in Ceylon (the marriage in question took place in Ceylon). The evidence given by that witness did not, however, make it clear whether all of the ceremonies described were essential or whether some of them were essential and others merely customary; and this Court has of course no judicial knowledge of what constitutes a valid marriage of Hindus in Ceylon. The evidence of the actual ceremonies performed in this case consisted (1) of that of the alleged husband and wife, who briefly stated that they were married according to Hindu rites, mentioning in particular the tying of a chain or Tali and (2) of that of an independent witness the father of the bride, who described the ceremony in greater detail; but it is sufficient to observe that he did not testify by any means to all of the rites mentioned by the Brahmin priest. This evidence must leave the Court in doubt as to whether the ceremonies which were performed included the essentials of a valid marriage."

Thorne, J. in his judgment says.—

> "The record, as I have said, discloses that the parties together performed some ceremonies but no evidence was adduced to prove what ceremonies were necessary to constitute a valid marriage between persons of the race and religion of these parties according to the Law of Ceylon."

It is a question then in each case of the sufficiency of the evidence to establish the two necessary matters required, i.e. what the actual ceremony was and that it constitutes a valid marriage.

The Deputy Legal Adviser (for the Public Prosecutor) referred to *Trevelyan's* Hindu Law (3rd edition) at page 45 and 64 on the subject of Hindu Marriage. At page 64 the author states:—

> "Ceremonies vary according to local or family or caste usage."

He also states that "Marriage with the daughter of a paternal aunt or of a maternal uncle is recognised."

Indeed it appears that, if the parties are of the proper age, that is the proper marriage.

In this present case there is the evidence of the complainant, who describes in detail the various ceremonies performed at his marriage.

There is the evidence of the mother of the bride who states that "the marriage was according to the customs of our caste."

There is the evidence of a "Pandaram" who has conducted a number of marriages and whose evidence as to the proper ceremonies necessary for a valid marriage establishes that the ceremonies actually performed in this marriage are sufficient to constitute a valid marriage.

For the second ground of appeal counsel for the appellant relied upon the case of the *Public Prosecutor* v. *Liew Hin* (1934) 3 M.L.J.

This was a case of revision by Terrell, Ag. C.J. (F.M.S.). The relevant passage in the judgment proceeds:—

> "I do not accept the Indian authority *re Kumarasami*, 2 M.H.C. 331 cited in paragraphs 5607 and 5608 of Gour in which Scotland, C.J. lays it down that it is quite immaterial if the woman was the tempter. To my mind it is essential for the purposes of a conviction to prove that the solicitations and advances came from the man. The essence of the case is enticement and the words of a penal section cannot be strained against the accused. If there was no "taking or enticement" there cannot be an offence under section 498. This interpretation is in accordance with the English authorities on the analogous cases of a charge of taking away a girl under 16 from the possession of her parents, see *Rex* v. *Jarvis*, 20 Cox Criminal Cases and the English and Indian cases cited in Gour in the notes to paragraph 3807."

But I do not read this judgment as meaning that in a charge of an offence under section 498 Penal Code it is essential to prove "enticement." The conviction under revision was for "enticement."

The words of the section are clear and the offence is committed if there is either a *"taking" or an "enticement"*—all that is required is that there must be proved one of two things—something done by the accused which is either (1) an act of "taking" or (2) an enticement.

Nor is the case of *Rex* v. *Jarvis* an authority for the proposition advanced. That was a charge of *taking* an unmarried girl, under 16 years of age, out of the possession and against the will of her father—under 24 and 25 Vict. C. 100 s. 55.

This section 55 reads:—

> " Whosoever shall unlawfully *take or cause to be taken* any unmarried girl, being under the age of 16 years out of the possession and against the will of her father or mother...."

Here a "taking" must be proved; there is no alternative of "enticing" as in sec. 498 of the Penal Code.

In *Rex* v. *Jarvis*, in his direction to the Jury, Jelf, J. says:—

> " Although there must be a taking, yet it is quite clear that an actual physical taking away of the girl is not necessary to render the prisoner liable to conviction; it is sufficient if he persuaded her to leave her home or go away with him by persuasion or blandishments. The question for you is whether the active part in the going away together was the act of the prisoner or of the girl; unless it was that of the prisoner he is entitled to your verdict."

This case then is only an authority for the proposition that persuasion, blandishment, or enticement is a constructive "taking" within the meaning of sec. 55 of the English Act.

Finally I would refer to a Calcutta case of *Janendra Nath Dey* v. *Khitish Chandra Dey*, 39 C.W.N. 1280 (1935).

That was a Criminal Revision before Lort-Williams, J. and Jack, J. The judgment states:—

> " The question is whether the accused took or enticed her away. There is no definition in the Code of the word 'taking.' It apparently is intended to mean something different from "enticing." It cannot mean "taking by force" because this would amount to abduction. In our opinion a case under section 498 is sufficiently established if it can be shown that the accused personally and actively assisted the wife to get away from her husband's house or from the custody of any person who was taking care of her on behalf of the husband."

With this explanation of the meaning of "taking" I respectfully agree with the qualification that the use of the words "from her husband's *house*" have reference to the facts of that particular case.

All that section 498 requires is a "taking away" from the husband or from any person having the care of her on his behalf.

The appeal against the conviction is dismissed.

Appeal dismissed.